

Appendix H--Ethics Issues Related to Participation in OMB Circular A-76 Cost Comparison Studies and Exercise of Right of First Refusal of Employment

The following provides guidance concerning the law and employee participation in CA studies. Activity commanders should encourage maximum participation by their employees, particularly in the data collection and review phases of the study, because active employee participation typically results in a comprehensive PWS and a more complete MEO. Since circumstances may vary, employees participating in CA studies should seek guidance from their supervisor and ethics counselor to determine individual compliance requirements.

1. *Title 18 U.S.C. 207, Restrictions on former officers, employees, and elected officials of the Executive and Legislative Branches* prohibits a Federal employee from personally and substantially participating in any particular matter that has a direct and predictable effect on the employees' financial interests. Additionally:

a. These restrictions do not apply at the time of the preparation of the PWS or MEO because any future employment offer is contingent upon the outcome of the cost comparison.

b. The cost comparison results in the award of a contract only if the contractor's cost is less than the cost of the MEO. Uncertainty as to the eventual outcome of a competition makes it unlikely that an employee's participation in the study constitutes "a direct and predictable effect" on their financial interests or post-Federal employment opportunities.

c. Employees' exercise of their Right of First Refusal, by itself, does not constitute "seeking employment" under DODD 5500.7-R, Joint Ethics Regulation, 30 August 1993 or as an arrangement regarding future employment.

d. An employees' (and supervisors') Right of First Refusal does not, by itself, create a conflict or appearance of a conflict of interest. Financial interests are imputed only if an employee enters into employment negotiations while the employee is actively participating in a cost comparison. If this occurs, employees must immediately consult with their supervisor and ethics counselor to determine whether their participation constitutes "personal and substantial" participation with a "direct and predictable" outcome for the non-Federal entity making the offer of employment. Ordinarily, providing technical data to assist in the development of a PWS and/or MEO is unlikely to have a "direct and predictable" effect on either the final MEO or contract offers.

2. *Title 18 U.S.C. 208, Acts affecting a personal financial interest* prohibits former officers or employees from making a communication or appearance with the intent to influence the Federal Government on any particular matter they personally and substantially participated in while they were a Federal employee. This prohibition usually will not apply to most study participants since their participation is generally limited to the early development of the PWS and MEO and is usually prior to any solicitation actions.

3. *Title 41 U.S.C. 423, Procurement Integrity* establishes post-Government employment restrictions for employees personally and substantially participating in a solicitation. Personnel subject to this prohibition are generally limited to those employees performing evaluations or rendering decisions as part of the source selection process.

a. The FAR Part 3.104-3, Definitions states that the following activities are not "substantial" for the purpose of prohibiting employee participation in A-76 studies:

(1) Participation in management studies

(2) Preparation of the In-House Cost Estimate

(3) Preparation of the MEO

(4) Furnishing data or technical support to be used by others in the development of the PWS, statement of work, or specifications

b. Individual employees participation in A-76 competitions does not, by itself, automatically jeopardize their exercise of Right of First Refusal, unless:

(1) They were, or formerly acted as, a Procurement Official as defined by Title 41 U.S.C. 423, Procurement Integrity.

(2) They formerly made decisions related to:

(a) Awarding a contract, subcontract, task delivery order, or contract modification

(b) Establishing contract overhead/other rates, approving issuance of a payment to a contractor, or paying/settling a contractor claim against the Government.